IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5168

FREEHOLD COGENERATION ASSOCIATES, L.P.,
PLAINTIFF-APPELLANT,
v.
BOARD OF REGULATORY COMMISSIONERS OF
THE STATE OF NEW JERSEY, ET AL.,
DEFENDANTS-APPELLEES.

On Appeal from the United States District
Court for the District of New Jersey
Honorable Mary Little Parell, Judge

BRIEF FOR AMICUS CURIAE FEDERAL ENERGY REGULATORY COMMISSION SUPPORTING PLAINTIFF-APPELLANT

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BRIEF FOR AMICUS CURIAE FEDERAL ENERGY REGULATORY COMMISSION SUPPORTING PLAINTIFF-APPELLANT

STATEMENT OF INTEREST

This brief is filed in response to the Court's Order of May 6, 1994, requesting the Federal Energy Regulatory

Commission ("Commission" or "FERC") to address "the jurisdictional issues facing this Court" and inviting the Commission to respond to "any of the other issues raised by this appeal that it desires to." FERC will limit its response to the jurisdictional issues and the related issue of abstention.

STATEMENT OF JURISDICTION

FERC agrees with the jurisdictional statement contained in the brief (Pet. Br. 1) of plaintiff-appellant Freehold Cogeneration Associates, L.P. (Freehold), that the district court had jurisdiction pursuant to 28 U.S.C. § 1331 over this action to enforce the exemption of the Public Utility Regulatory Policies Act of 1978 (PURPA) for Qualifying Facilities (QFs) from state rate and financial regulation, 16 U.S.C. § 824a-3(e), and the commission's rules promulgated thereunder. 18 C.F.R. § 290.101, et seq.

STATEMENT OF THE ISSUES

The Commission will address the following issues:

1. Whether the district court erred in its conclusion that it was without jurisdiction to entertain Freehold's complaint because of the jurisdictional limitations of Section 210(g) of PURPA, 16 U.S.C. § 824a-3(g).

2. Whether the district court erred in finding that the Johnson Act, 16 U.S.C. § 1342, deprived it of jurisdiction to review the order of a state commission challenged on the ground that it violated PURPA.

3. Whether the district court could properly rely on the contract between Freehold and Jersey Central Power & Light (Jersey Central) to find it was without jurisdiction over Freehold's complaint.

4. Whether the complaint is dismissible under the principles of abstention established by Younger v. Harris, 401 U.S. 37 (1971), Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions pertinent to this case are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below

We adopt the statement in Freehold's brief (at pp. 4-5) concerning the nature of the case.

II. Statement of Facts

A. Regulatory Context

1. Under Part II of the Federal Power Act (FPA), 16 U.S.C. § 824 et seq., the Commission has the exclusive authority to regulate "public utilities" that sell electric power at wholesale in interstate commerce. See 16 U.S.C. § 824(e). In 1978, Congress modified the FPA with the enactment of PURPA, which was designed "to encourage the development of cogeneration and small power production facilities" to foster increased use of alternatives to fossil fuels. FERC v. Mississippi, 456 U.S. 742, 750 (1982)(footnote omitted).

PURPA defined a "cogeneration facility" as one which produces both electricity and "steam or forms of

useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes." 16 U.S.C. § 796(18)(A). It also created a category of "qualifying cogeneration facilities" (known as QFs), which would include any facility which the "the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe," as well as certain ownership requirements. 16 U.S.C. § 796 (18)(B).[1]

2. In enacting PURPA, Congress sought to eliminate two major barriers that had previously impeded the growth of cogeneration facilities: that 11(l) traditional electric utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development." FERC v. Mississippi, supra, 456 U.S. at 750-751 (footnotes omitted).

To meet the first problem, Section 210(a) of PURPA, 16 U.S.C. § 824a-3, required the Commission to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring traditional utilities to purchase electricity from QFs. FERC v. Mississippi, supra, 456 U.S. at 751.[2] To overcome the second barrier, Section 210(e) of the Act requires the Commission to implement regulations exempting

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1 The PURPA QF category also includes "small power production" facilities using renewable resources to generate electricity, 16 U.S.C. § 796(17), which receive the same statutory benefits as cogeneration QFs such as Freehold.

2 In turn, Section 210(f) of PURPA requires that "each State regulatory authority shall . . . implement" the rules adopted by the Commission under Section 210(a) to encourage QF development. 16 U.S.C. § 824a-3(f).

QFs from such federal regulation to which traditional electric utilities are subject, including most provisions of the FPA, as well as "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." 16 U.S.C. § 824a-3(e)(1).

3. In accordance with these provisions of PURPA, the Commission promulgated regulations governing transactions between utilities and QFs, including a specific requirement that a utility must purchase electricity made available by a QF at a rate up to the utility's full avoided cost. 18 C.F.R. §§ 292.303; 292.304 (1993). See generally American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402, 414-415 (1983). Avoided cost is defined by the statute as "the cost to the electric utility of the electric energy which, but for the purchase from [a QF], such utility would generate or purchase from another source." Section 210(d), 16 U.S.C. § 824a-3(d).

Acting pursuant to Section 210(e)(1) of PURPA, the commission also promulgated regulations exempting QFs from various federal and state regulatory requirements. 18 C.F.R. § 292.602(c). That section states, in pertinent part:

> (1) Any [QF] shall be exempted . . . from State law or regulation respecting:
>
> (i) The rates of electric utilities; and
>
> (ii) The financial and organizational regulation of electric utilities.

It is this exemption for QFs from state utility regulation, provided for in Section 210(e) of PURPA and further fleshed

out by Commission regulations, which is the basis of Freehold's claim here.

B. The Proceedings Below.

Freehold, certified as a QF by the Commission in October, 1993,[3] intends to construct and maintain a cogeneration facility in Freehold, New Jersey. To this end, on March 26, 1992, Freehold entered into a long-term Purchase Power Agreement (PPA) with Jersey Central Power & Light Company (Jersey Central), under which Freehold would provide capacity and energy to Jersey Central over a twenty-year period at rates set at 1989 avoided costs. On July 8, 1992, the Board of Regulatory Commissioners of the State of New Jersey (BRC) issued an order approving the PPA and the rates it established. JA. 113-118.

The present dispute stems from the BRC's attempt to reexamine the level of Freehold's avoided cost rates. On April 12, 1993, the BRC issued an order (the Towner order), directing electric utilities to explore remedies for contracts with QFs that were no longer economically sound. JA. 215-223. On January 5, 1994, the BRC issued an order rejecting a settlement reached by its staff and Freehold which would have modified the rates on the ground that "the Joint Agreement leaves the pricing in the [PPA] significantly above current forecasts of avoided cost." JA. at 141. The BRC went on to urge Freehold and Jersey Central to negotiate a modification of the PPA pursuant to Towner, but advised the parties "that if they cannot reach agreement on either reasonable renegotiated pricing terms more consistent with current avoided costs or a buy-out arrangement within 30 days," the BRC would "commence a proceeding to consider

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3 Freehold Cogeneration Associates, L.P., 65 FERC ¶ 62,004 (1993).

whether its previous approval of (the PPA] should be modified or otherwise reconsidered or revoked." Id. at 142. (In fact such a proceeding was instituted and is presently ongoing).

2. At this point, Freehold filed a civil action in the United States District Court for the District of New Jersey against both the BRC and Jersey Central, seeking a declaratory order that BRC's January 5, 1994, order initiating a proceeding to determine whether the PPA should be modified, was preempted by PURPA and asking that court enjoin the state proceeding. The BRC and Jersey Central moved to dismiss the complaint on various grounds, three of which were relied upon by the district court in its March 18, 1994, order dismissing Freehold's complaint.

First, the court found that the case was governed by PURPA's judicial review provisions, 16 U.S.C. § 824a-3(g), which incorporates 16 U.S.C. § 2633, divesting the federal courts of jurisdiction to review certain orders of state regulatory commissions. JA. at 883-884.[4] Second, it held

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4 Subsection (g) provides:

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

that judicial review was precluded by the Johnson Act, 28 U.S.C. § 1342 (set out at p. 16, infra), which curtails federal jurisdiction with respect to orders of state regulatory authorities if certain specified conditions are all met. Id. at 884-887. Third, the judge relied on the choice of law provision in the PPA itself (set out at JA. 104-105). Her reading of the contract indicated that "the parties contemplated that all disputes arising under the PPA would be resolved either by the BRC or by a New Jersey state court." Id. at 887 (emphasis in original).

This appeal followed, while the BRC proceeding continued below.

SUMMARY OF ARGUMENT

I.

A. Freehold properly invoked federal court jurisdiction in this case under 28 U.S.C. § 1331. Freehold's claim is that its federally-established PURPA rights under Section 210(e) are being violated by a state proceeding, precisely the type of situation addressed by Section 1331.

The district court's contrary conclusion was based on an erroneous reading of Section 210(g) of PURPA as a broad exception to federal jurisdiction over PURPA claims. Neither subsection of Section 210(g) applies to a claim, like Freehold's, that state action is barred by Section 210(e) and the FERC regulations promulgated thereunder exempting QFs from state utility regulation.

Section 2633, 16 U.S.C. § 2633 (reproduced in the statutory appendix), is the general judicial review provision of PURPA, which essentially divests the federal courts of jurisdiction "over any action arising under any provision of subchapter I or III' of PURPA, subject to certain exceptions.

B. The district court's dismissal of Freehold's complaint on the basis of the Johnson Act, 28 U.S.C. § 1342, was also erroneous. Because the statute only bars complaints against state regulatory proceedings where jurisdiction is based "solely on . . . repugnance of the order to the Federal Constitution," governing case law demonstrates that the Johnson Act is no bar to a statutory preemption claim. Since Freehold's claim is clearly based on PURPA, a statutory ground, the district court misapplied the Act. Similarly, the Act's requirement that the state order challenged does not affect interstate commerce is lacking here since any allegation of a PURPA violation inherently contains an allegation of such impact.

C. Finally, the district court's dismissal of the case on the basis of the choice of law clause of the PPA is also erroneous. Freehold accurately, we submit, characterizes its case as a preemption claim brought against the BRC to enforce PURPA rather than a dispute under the PPA. The PPA provision is irrelevant to this issue.

II.

The abstention doctrine, established in Younger v. Harris, 401 U.S. 37 (1971)(Younger), Burford v. Sun Oil Co., 319 U.S. 315 (1943)(Burford), and Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941)(Pullman), should not be applied to this case.

A. The inapplicability of Burford abstention is established by the decision of this Court in Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission, 791 F.2d 1111 (3rd Cir. 1986), cert. denied, 488 U.S. 941 (1988), and that of the Supreme Court in New Orleans Public Service v. City of New Orleans, 491 U.S. 350

(1986)(NOPSI), which hold the doctrine inappropriate to a claim that federal rate regulation preempts action by a state regulatory body.

B. Younger abstention would also be inappropriate here. This Court has held that state interests protected by Younger are generally outweighed by a claim of federal preemption. In addition, the Supreme Court in NOPSI made clear that a ratemaking proceeding, such as the one here, is a legislative process to which Younger abstention has no application.

C. Finally, Pullman abstention only applies in cases where the court would have to resolve difficult and unsettled questions of state law before a substantial constitutional question can be decided. Neither prerequisite is present in this case, which raises a claim that PURPA, a federal statute, preempts the action of a state regulatory body.

ARGUMENT

I. FREEHOLD PROPERLY INVOKED FEDERAL JURISDICTION TO RESOLVE ITS CLAIM THAT ITS FEDERALLY-ESTABLISHED PURPA RIGHTS ARE BEING UNLAWFULLY INFRINGED BY THE STATE REGULATORY ACTION

As described above, even though Freehold brought its complaint under 28 U.S.C. § 1331, the district court ignored this provision while relying on the review provisions of PURPA, the Johnson Act and the terms of the PPA to find it had no jurisdiction to decide Freehold's claims. We believe that the district court's analysis is flawed and that Section 1331 jurisdiction was properly invoked by the Freehold.

A. The Jurisdictional Limitations Of Section 210(g) Of PURPA Have No Application To This Proceeding

By holding that Section 210(g) of PURPA, 16 U.S.C. § 824a-3, divests the federal courts of jurisdiction in this case, the district court, in our view, not only ignored the Freehold's assertion of jurisdiction under Section 1331, but also the inherent limitations of Section 210(g) itself.

1. At the outset, the district court's assessment of federal jurisdiction did not confront Freehold's assertion that its preemption claim properly invoked federal jurisdiction under 28 U.S.C. § 1331. As we understand it, Freehold's position on this aspect of the case is that its federally-established PURPA rights are being violated by a state proceeding. This is precisely the situation addressed by Section 1331, as the Supreme Court explained in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983)(authorities omitted; emphasis added):

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. . . . A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Accord, Airco Industrial Gases, Inc. v. Teamsters Health and Welfare Pension Fund, 850 F.2d 1028, 1032-1035 (3rd Cir. 1988).

The district court apparently believed that Section 1331 was irrelevant because it read PURPA Section 210(g) as carving out a broad exception to federal jurisdiction over PURPA claims other than judicial review of a final decision by FERC. JA. at 884. In the court's view (id.),

> [B]y enacting [Section 210(g)] and § 2633, Congress specifically provided that judicial review of orders by the State regulatory authorities was to made only by the state courts or FERC. The only instance where Congress provided for federal jurisdiction is where a party seeks judicial review of a decision by FERC. Here, FERC has made no determination which this Court might review, nor does Freehold allege this as a basis for jurisdiction. Thus, under PURPA, this Court does not have jurisdiction over Freehold's challenge to the BRC's order. See Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1374 (N.D. Ga. 1986), aff'd, 844 F.2d 1538 (11th Cir. 1988).

As a fair reading of the text of Section 210(g) reveals, the court misapprehended the carefully limited scope of that provision.

Subsection (1) of Section 210(g) applies only to review of proceedings by state regulators or nonregulated utilities designed to "implement[] any requirement" of rules

promulgated by the Commission pursuant to Section 210(a), 16 U.S.C. § 824a-3(a). (Section 210(a), as we explained above, was the mandate under which the Commission promulgated its original rules requiring electric utilities to purchase and sell electricity to and from QFs. See 18 C.F.R. Part 292, Subparts A, B.)

Freehold's claim, however, is not a challenge to the validity of state action implementing the rules adopted by the Commission pursuant to Section 210(a) of the Act, but that the BRC proceeding is inconsistent with and preempted by Section 210(e) and the FERC regulations promulgated thereunder, which exempt QFs from state utility regulation. 16 U.S.C. § 824a3(e)(1); 18 C.F.R. § 292.602(c). Accordingly, the jurisdictional limitations of Section 210(g)(l)--regarding state proceedings "implementing any requirement of a rule" enacted under that section--have no relevance to the federal jurisdiction alleged here by Freehold. Rather, the gravamen of Freehold's claim is that the BRC is subjecting it to the very utility regulation precluded by Section 210(e) and the Commission's implementing regulations.

The jurisdictional limitations of Subsection (2) of Section 210(g) are of even less relevance to Freehold's action. That subsection applies to cases brought by any person against a QF (or other small power producer) to enforce any requirement established by state regulatory authorities or nonregulated utilities pursuant to Section 210(f), which governs the sale and purchase of electricity between utilities and QFs- But the instant case involves neither a state regulation promulgated pursuant to Section 210(f), nor is brought by a person against a QF to enforce such a requirement.[5]

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5 Our position here is fully consistent with the Commission's "Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of [PURPA]," 23 FERC ¶ 61,304 (May 31, 1983), relied on

2. The recent case of Bristol Energy Corp. v. State of New Hampshire Public Utilities Commission, 13 F.3d 471, 474 (1st Cir. 1994), is also instructive in this regard. There, similar to Freehold's assertion here, several QFs brought an action against a state commission claiming that a regulatory proceeding violated the PURPA exemption and was thus preempted. The First Circuit rejected the contention that federal jurisdiction over the claim was lacking, holding that Section 1331 authorized review of state action that allegedly interfered with PURPA's QF exemption. In specifically rejecting the claim that Section 210(g) divested it of jurisdiction, the court described that section as "plac[ing] limits on federal jurisdiction in proceedings involving rules implementing 16 U.S.C. §§ 824a-3(a) and -3(f), rules not at issue in this case." 13 F.2d at 474 (footnote omitted).

This reasoning should govern here as well, for as in Bristol, Freehold's claim here is based on the Section 210(e) exemption, not rules implementing either subsections (a) or (f). Accordingly, the district court erred in dismissing Freehold's complaint on the basis of the PURPA jurisdictional limitations.[6]

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by the district court. JA. 883-884. The Policy Statement did not discuss Section 210(g) jurisdiction in cases arising under Section 210(e).

[6] Greensboro Lumber Co., supra, on which the district court relied, is not to the contrary. There, the court held that Section 210(g) divested it of jurisdiction over a claim that a nonregulated utility had failed to adhere to its own implementation plan in its dealings with a particular QF. 643 F. Supp. at 1374. Rather, the court held, the statute requires that such a claim "must be [brought] in state court, which has exclusive jurisdiction 'to enforce any requirement' of a nonregulated utility's implementation plan." Id. The case thus involved a claim under Section 210(f)(1), not a complaint such as Freehold's, invoking the Section 210(e) exemption.

B. The Johnson Act Does Not Apply To A Complaint Asserting That Federal Law Preempts A State Regulatory Action

1. The second basis for the district court's dismissal of Freehold's complaint was that dismissal was required by the Johnson Act, 28 U.S.C. § 1342. JA. 884-887. In our view, the court's reliance on the Johnson Act in these circumstances of this case was clearly erroneous.

The Johnson Act provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and
>
> (3) The order has been made after reasonable notice and hearing; and
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

As the district court correctly recognized, all four of the Act's criteria must be met for it to apply. JA. 885. While the court held that the elements were all present here, its reasoning was unsound.

2. First, the court below concluded the statute's demand that "jurisdiction be based solely on . . . repugnance of the order to the Federal Constitution," was present because (JA. 885-86)

> Freehold seeks declaratory and injunctive relief in this action on the basis that the BRC's Order dated January 5, 1994[,] is preempted by PURPA. The doctrine of pre-emption is based on the Supremacy Clause of the Federal Constitution. . . . It is apparent that Freehold alleges jurisdiction on the basis that the Order is repugnant to the Federal Constitution since Freehold claims that the Supremacy Clause mandates the Order give way to PURPA. (authority and footnote omitted).

This analysis, however, wholly ignores the Johnson Act's explicit requirement that such claims be based "solely" on the federal constitution. As the United States Court of Appeals for the Fifth Circuit explained in holding that the Johnson Act was no bar to a preemption claim based on the Federal Power Act, "a federal question about the preemptory effect" of the Act "cannot be seen to rely 'solely' on constitutional grounds." New Orleans Public Service, Inc. v. City of New Orleans, 782 F.2d 1236, 1242 (5th Cir. 1986), vacated in part on other grounds, 798 F.2d 858 (1986), cert. denied, 481 U.S. 1023 (1987). Thus, the court concluded, "[a] statutorily-based preemption claim will not provide a basis for invoking

the Johnson Act to deprive federal courts of jurisdiction." 782 F.2d at 1242-43 (authorities omitted). Accord, Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission, 620 F. Supp. 1458, 1460-61 (M.D. Pa. 1985), rev'd on other grounds, 791 F.2d 111 (3rd Cir. 1986).[7]

3. While this error is in itself sufficient to reverse the district court's holding with respect to the Johnson Act, there are additional deficiencies in its interpretation. Concerning the Act's requirement that the contested order "not interfere with interstate commerce," the court opined in conclusory fashion: "There is no indication that the Order interferes with interstate commerce; nor does Freehold assert any interference with interstate commerce." JA. 886.

This is plainly wrong. As the Supreme Court explained in FERC v. Mississippi, supra, "it is difficult to conceive of a more basic element of interstate commerce than electric energy," 450 U.S. at 757. Indeed, the Court observed that Congress, in enacting PURPA, specifically employed its poster under the commerce clause of the constitution because federal regulation of "relationships between cogenerators and electric utilities[] was essential to protect interstate commerce." 456 U.S. at 758. It is only by ignoring these salient considerations that the district court could in such an offhand manner find that Freehold had failed to allege that the BRC order did not affect interstate commerce. On the contrary, in view of the description of the statute, Freehold's allegation that the state order violates PURPA inherently contains an allegation that it interferes with interstate commerce.

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7 See also International Brotherhood of Electric Workers v. Public Service Commission of Nevada, 614 F.2d 206 (9th Cir. 1980); Aluminum Company of America v. Utilities Commission of North Carolina, 713 F.2d 1024 (4th Cir. 1983), cert. denied, 465 U.S. 1052 (1984).

Because two of the elements essential for the Johnson Act to bar federal jurisdiction are missing here, the district court's dismissal of Freehold's complaint on this basis was clear error.

C. The District Court's Reliance On the PPA

As we have described above, the district court's third rationale for dismissing the case was the choice of law clause of the PPA. In the court's view (JA. 887),

> the parties provided that the PPA "shall be governed by and construed in accordance with the laws of the State of New Jersey applicable to contracts made and to be performed in that State, irrespective of the application of any conflicts of laws provisions." (PPA ¶ 28.1(a).) Further, the parties "agree[d] that all disputes arising under [the PPA] not resolved between the parties shall be decided by a petition to the BRC or a court of competent jurisdiction in the State of New Jersey and [Freehold] hereby submits itself to the jurisdiction of the BRC or such court for such purposes." (PPA ¶ 28.1(b).)

It is true that nothing in PURPA nor its regulations prevents Freehold from waiving its statutory rights. See 18 C.F.R. § 292.301(b)(1). Hence there is no legal bar to Freehold consenting to having PPA disputes heard in state court. Freehold argues, however, that the choice of law provision is irrelevant to its complaint because its case is a preemption claim arising under PURPA brought against the BRC, not a

dispute under the PPA. Pet. Br. 28-29. Because Freehold's characterization of the PPA case is plainly correct from the face of the agreement, we believe that the district court erred in employing the PPA as a vehicle for rejecting jurisdiction over the case.[8]

II. BECAUSE THE STATE AUTHORITY OVER FREEHOLD'S RATES IS EXCLUSIVELY DERIVED FROM PURPA, THE ABSTENTION DOCTRINE IS INAPPROPRIATE HERE

Appellees argued extensively below that the district court should not hear Freehold's claim against the BRC on the basis of the abstention doctrine, the major strands established in Younger v. Harris, 401 U.S. 37 (1971) (Younger), Burford v. Sun Oil Co., 319 U.S. 315 (1943) (Burford), and Railroad Commission of Texas v. Pullman, 332 U.S. 496 (1941) (Pullman).

As this Court has explained, the doctrine is

> in all its forms. . . an extraordinary and narrow exception to the district court's duty to adjudicate a controversy properly before it, justified only in the exceptional circumstances where resort to state proceedings clearly serves an important countervailing interest.

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8 The merits issue of whether the PPA's "regulatory out" clause, ¶ 20.2(a) of the Agreement, JA. 99-100, represents a waiver by Freehold of its right to lock-in its avoided cost rate at the 1989 level, also involves interpretation of the PPA. The Commission takes no position on this issue, since its resolution involves, inter alia, contract interpretation under state law. As noted (supra p. 1), the Commission does not address any merits issue in this brief but has limited its response to the jurisdictional issues and the related issue of abstention.

United Service Automobile Association v. Muir, 792 F.2d 356, 360-61 (3rd Cir. 1986), cert. denied, 479 U.S. 1031 (1987), citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976).

Because this case presents no such extraordinary situation, it would be legally erroneous here to apply the abstention doctrine in any of its aspects.

A. Burford Abstention Is Inappropriate Here

The inapplicability of Burford abstention is directly established by this Court's decision in Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Gas Company v. Pennsylvania Public Utility Commission, 791 F.2d 1111 (3rd Cir. 1986), cert. denied 488 U.S. 941 (1988) (Kentucky West Virginia), as well as that of the Supreme Court in New Orleans Public Service v. City of New Orleans (NOPSI) 491 U.S. 350, 360-362 (1989).

In Kentucky West Virginia, this Court explained that Burford abstention was appropriate in two situations (791 F.2d at 115):

> [F]irst, where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; and second, where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. (quoting Colorado River, supra, 424 U.S. at 814)(internal

quotation marks omitted)(emphasis added).

There, a utility company challenged a state regulatory commission's retail rate orders on the ground that they were preempted by the Natural Gas Act and the Natural Gas Policy Act. While acknowledging the great interest the states have in regulating retail rates, the Court noted that other circuits had adopted the view that "Burford abstention is almost never appropriate where a federal plaintiff asserts a preemption claim" because "[t]he purpose of Burford abstention is to avoid federal intrusion into matters of local concern which are within the special competence of local courts," while "federal courts are particularly appropriate bodies for application of preemption principles." 791 F.2d at 1115, quoting International Brotherhood of Electrical Workers, supra, 614 F.2d 206, 212 n.1 (9th Cir. 1980), vacated on other grounds, 468 U.S. 491 (1984) & Kennecott Corp. v. Smith, 637 F.2d 181, 185 (3rd Cir. 1980), quoting Hagans v. Levine, 415 U.S. 528, 550 (1974).

Applying these principles, the Court in Kentucky West Virginia held Burford abstention inappropriate where a complaint alleged that federal rate regulation preempts action by a state regulatory body. Here, Freehold also claims to vindicate a federal interest created by PURPA, a federal law. Indeed, as we have explained above, state regulation of CIF rates derives solely from federal law. Proper application of the principles of Kentucky West Virginia to the case at bar thus rejects the propriety of Burford abstention here.

The Supreme Court decision in NOPSI is likewise dispositive. That case was brought by an electric utility against a local retail ratemaking body where the utility alleged an order of the local commission conflicted with a FERC decision and thus found Burford violated preemption principles. The Court found Burford abstention inapplicable

because resolution of the complaint involved no federal intrusion into state law or policy. Rather, it required inquiry into Federal Power Act principles, a matter of exclusive federal concern. 491 U.S. at 363-364.

Here, similarly, this Court's examination whether the BRC's orders violate PURPA does not impermissibly intrude into New Jersey's interests. Indeed, any judicial analysis of the rights and responsibilities of Freehold and the BRC under PURPA manifestly requires a review of what is permissible under federal law.

B. Younger Abstention Is Similarly Inappropriate

Younger abstention similarity has no application in the present context.

As an initial matter, Kentucky West Virginia, supra, establishes that Younger abstention would be improper here. While Younger could apply only where the state proceeding at issue "must implicate important state interests,"[9] state interest in retail rate regulation, the Court reasoned, fell before an "equally important federal interest in regulating interstate gas rates, authority over which Congress has vested exclusively in FERC." 791 F.2d at 1116. Thus, the Court concluded, abstention was improper because "[t]he legitimate state interests contemplated by Younger . . . do[] not exist when state action has been preempted or foreclosed by the Constitution." 791 F.2d at 1116-1117, quoting Middle South Energy Inc. v. Arkansas Public Service Comm'n, 772 F.2d 404, 417 (8th Cir. 1985), cert. denied, 474 U.S. 1102 (1986) (additional authorities omitted).

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9 791 F. 2d at 1116, quoting Coruzzi v. State of New Jersey, 705 F.2d 688, 690 (3rd Cir. 1983); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

In any event, any reliance on Younger is clearly foreclosed by the Supreme Court's decision in NOPSI, which specifically held that because ratemaking is a legislative, father than a judicial, process, Younger abstention does not apply to a state ratemaking proceeding. 491 U.S. at 367-70. The same rationale governs here.

C. Pullman Abstention Is Likewise Inappropriate

Finally, we submit that Pullman abstention is no more applicable in this case than the other branches abstention doctrine already discussed. Pullman "instructs 'that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial constitutional question can be decided.'" United Services Automobile Ass'n, supra, 792 F.2d at 361, quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1934).

In our view, just to state the doctrine is to refute its application to the instant case. This case does not turn on "difficult or unsettled questions of state Law," but is inextricably linked to Freehold's PURPA claim, which is a matter of exclusively federal interest.

CONCLUSION

For the reasons stated herein, the Court should reverse the district court's decision that it was without jurisdiction to hear this case.

Respectfully submitted,

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